

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL TOLAND,

Defendant-Appellant.

UNPUBLISHED

October 6, 2005

No. 254027

Wayne Circuit Court

LC No. 99-008697-01

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

The jury convicted defendant of two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c, and sentenced as a habitual offender, fourth offense, MCL 769.12, to eleven to forty years in prison. Defendant appeals his sentence and we affirm.

The statutory guidelines established a minimum sentence range of nineteen to seventy-six months in prison. MCL 777.64. The trial court originally imposed a sentence of twenty to forty years, citing as reasons for departure that the victim was defendant's fourteen-year-old niece and "that she was a guileless innocent or retarded child" who was "exploited because of her mental limitations." This Court agreed that the reasons cited by the trial court justified an upward departure from the guidelines, but determined that the reasons cited did not justify the extent of the departure and remanded for resentencing. *People v Toland (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2003 (Docket No. 227354). On remand, the trial court imposed a minimum sentence of eleven years, and gave as reasons for the departure those previously used by the trial court and the additional reasons that defendant had escaped from prison and had accumulated numerous misconduct citations while in prison. Defendant again challenges the reasons for and the extent of the departure.

The trial court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Only objective factors that are capable of verification and that are substantial and compelling reasons may be used to deviate from the minimum sentence range. We review the trial court's determination regarding the existence of a reason or factor warranting departure for clear error, the determination that a particular factor is objective and verifiable for error, and the determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory

minimum sentence for an abuse of discretion. An abuse of discretion “occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *People v Babcock*, 469 Mich 247, 273-274; 666 NW2d 231 (2003).

The factors previously cited by the trial court are objective and verifiable and present substantial and compelling reasons for a departure. *Toland, supra*, slip op at 2. And, the law of the case doctrine thus prevents defendant from contending otherwise here. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The additional factors cited by the trial court, that defendant had escaped from a corrections center in July 1990 and had acquired eleven misconduct tickets since being incarcerated, are also objective and verifiable. These factors are not taken into account by the guidelines, and thus presented substantial and compelling reasons for a departure. MCL 769.34(3)(b).

Once the trial court has a valid basis for departing from the guidelines, the reasons cited by the court must justify the particular departure. *Babcock, supra* at 272-273; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). The extent of the departure must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock, supra* at 264. “The amount a trial court departs from the guidelines is reviewed to determine whether the trial court abused its discretion.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The maximum minimum sentence under the guidelines was seventy-six months, or six years, four months. Because defendant took advantage of a young niece’s mental incapacity to sexually molest her because he committed these criminal acts after previous convictions that resulted in increasingly harsher sentences of probation, jail time, and prison time because defendant continued to engage in wrongful conduct, including sexual misconduct, while in prison, we find that the trial court did not abuse its discretion in departing upwards from the guidelines by four-plus years. *Abramski, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Markey